UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
ERICA ALMECIGA,

Plaintiff,

- against -

CENTER FOR INVESTIGATIVE REPORTING, INC., BRUCE LIVESEY, JOSIAH HOOPER,

Defendants.
--X

Case No. 15-CV-04319

Hon. Jed S. Rakoff

PLAINTIFF ERICA ALMECIGA'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, PURSUANT TO FED.R.C.P. 56(C)

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Plaintiff Erica Almeciga ("Plaintiff" "Almeciga") respectfully submits this Memorandum of Law in support of her Motion for Summary Judgment, pursuant to Fed.R.C.P. 56, against Defendants' Center for Investigative Reporting, Inc., Bruce Livesey and Josiah Hooper ("CIR Defendants"), as follows:

I. PRELIMINARY STATEMENT

In the instant case, the Best Evidence Rule requires CIR Defendants to produce the original of the photocopied Release they have offered in defense of this matter. The existence and contents of the purported Release, including any signatures it contains are in dispute, and therefore the Best Evidence Rule requires production of the original document to protect against perjury, fraud, inaccuracies, or mistakes in copying. Further, there is a genuine question as to the existence and authenticity of the original, and therefore, the original must be produced.

The central issue in this matter therefore concerns CIR Defendants failure to produce the original "Release" unilaterally supplied by the defendants in its own defense. Plaintiff, in turn, has vigorously contested the signing of the proffered Release, which incidentally remains a cluttered photocopy, of various fonts, colors, misspelling, and handwritten modifications, none of which resemble the Plaintiff's known handwriting. Plaintiff has further asserted through other own and the Affidavits of others, that the subject photocopied "Release" is itself a fabricated document.

Conversely, CIR Defendants have deliberately: (i) failed to offer any expert testimony to rebut Plaintiff's expert; (ii) rely solely on their own counsel's Declaration (which is not admissible at trial unless he decides to recuse himself as being the attorney of record and take the place as a witness for the defense); and (iii) offered only the subject photocopied "Release" replete with numerous deficiencies as to the veracity of its own genuineness.

At Plaintiff's deposition, after Mr. Burke again introduced a photocopy of the purported "Release", he was questioned by counsel for Plaintiff, Kevin Landau, if he had an original of the photocopy of the purported Release:

"Do you have an original of this?" Almeciga Dep., 19-20: 137.

In response to Mr. Landau's question, Mr. Burke stated as follows:

"**I don't know.**" Almeciga Dep., 21:137. See Statement of Undisputed Facts Pursuant to Local Rule 56.1 in Support of Plaintiff Motion for Summary Judgment at ¶¶ 13-18 (hereinafter "¶__").

In light of the evidence produced by Plaintiff, and counsel for CIR Defendants latest admission to the central issue of this case, Plaintiff makes this narrow motion for summary judgment under the Best Evidence Rule with respect to her claims against CIR Defendants.

The bottom line is simple; either CIR Defendants must produce the original "Release" forthwith, or lose the ability to challenge Plaintiff's allegations as to the photocopies containing a forgery. By way of legal principle, if the CIR Defendants are unable or unwilling to produce the original "Release" then no genuine defense to Plaintiff's contentions remain, and summary judgment must be granted in Plaintiff's favor as a matter of law for the reasons set forth herein.

II. STATEMENT OF FACTS

In August 2014, counsel for CIR Defendants provided Plaintiff with a photocopy of the purported Release ("Release"). ¶ 1. CIR Defendants admitted this fact in their

Answer. ¶ 1. In an Affidavit, Ms. Almeciga adamantly denied having ever seen the "Release" proffered by counsel for CIR Defendants, much less having signed it. ¶ 2. Ms. Almeciga provided CIR Defendants with this Affidavit (and has attached it as an Exhibit in responsive filings in this case), wherein she stated as follows:

"The Standard Appearance Release ("Release") provided by Center for Investigative Reporting ("CIR") and dated August 15, 2012 is a fake. See ¶ 2.

"I have never seen the Release before and it does not contain my signature. The printed handwriting at the top of said document is not my own either. I am truly disgusted and deeply disturbed with the manner in which CIR has forged these documents." CIR's conduct has destroyed my life!" ¶ 2.

On July 14, 2015, CIR Defendants provided their Initial Disclosures pursuant to Fed.R.Civ.P. 26(a). In identifying the documents that CIR Defendants may use in support of their defenses, CIR Defendants stated as follows:

"1. Documents evidencing the release signed by Plaintiff for use of her likeness in the Report." ¶ 3.

On July 14, 2015, Plaintiff provided CIR Defendants with her initial disclosures pursuant to Fed.R.Civ.P. 26(a), and stated that: "Plaintiff expects to use documents currently in the Defendants, and their agents, possession, custody, or control to support her claims." ¶ 4.

On or about July 14, 2015, Plaintiff served her First Requests for Production of Documents on CIR Defendants. In her Requests, Plaintiff requested, among other things, that CIR Defendants produce:

"Any contracts or agreements between CIR and the Plaintiff." Request to Produce, No. 4.

"Any Releases or waivers between CIR and the Plaintiff." Request to Produce, No. 5.

"Documents that in any way concern, support or refute, the allegations set forth in the Complaint." Request to Produce, No. 19.

In Response to these Requests, CIR Defendants stated in pertinent part, that it would "produce non-privileged documents in its possession, custody or control, if any, responsive to this Request." ¶ 5.

Attached to CIR Defendants amended Answer, as Exhibit A, was photocopy of the Release that counsel for CIR Defendants had provided counsel for Plaintiff in August 2014. ¶ 6.

In their Answer, counsel for CIR Defendants states multiple times that the photocopy the "Release" attached to the Answer "was executed by Plaintiff." ¶ 7.

On or about August 14, 2015, counsel for CIR Defendants, Thomas Burke, submitted a Declaration in support of CIR Defendants Motion for Sanctions Pursuant to Fed.R.Civ.P. 11(c). ¶ 8. In this Declaration, Mr. Burke states as follows:

"While Ms. Almeciga-Reta was still in Woodland, she executed a Standard Appearance Release (the "Release"), signing her name and printing her name and address on the lines provided at the bottom of the Release." ¶ 8.

Mr. Burke also stated in his Declaration that "a true and correct copy of the executed Release" was attached to his Declaration as Exhibit A. Burke Dec. ¶ 2.

Further, in his Declaration, Mr. Burke stated that he "declared under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." ¶ 8.

Once the discovery period commenced, Plaintiff engaged the services of a handwriting expert named Wendy Carlson who analyzed Plaintiff's signatures and handwriting in comparison to the Release offered by counsel for CIR Defendants, and opined that the Release was "not signed by Erica Almeciga." ¶ 9.

In her Rule 26 Report, Ms. Carlson further stated as follows:

"The Erica Almeciga signature on the question document does not match the known signature of Erica Almeciga, thereby revealing that someone did indeed forge the Erica Almeciga signature on the questioned document." ¶ 9.

Plaintiff also provided CIR Defendants with the Affidavit of Rosalio Reta the main subject of the stories at issue, attesting that his agreement with CIR was that he would participate in the stories on the condition that Plaintiff's identity be concealed and protected – and that Plaintiff's agreement with CIR was that she would participate in the interview on the condition that her identity be concealed:

"I agreed to let Mr. Livesey interview my fiancé Ms. Almeciga on one condition (her identity not disclosed) for fear of putting a target on her head. Mr. Livesey accepted an drew out a contract stating that the interview was to be conducted in a secure area and have my Fiance face blurred out for fear of reprisal." See ¶ 10.

Moreover, Plaintiff supplied CIR Defendants with additional affidavits from Plaintiff, and Isaac Duarte. In Mr. Duarte's Affidavit he attested that he had personally witnessed Plaintiff sign her name thousands of times and that the signature on the Release was not hers. See ¶ 11.

Also, the "Release" offered by CIR Defendants is filled with inconsistencies. For instance, the handwriting on the Release is different in sections, and in different colors, the spelling of Plaintiff's name is different "Erica" vs. "Eryca" and the name is in different handwriting as well; the date is crossed out at the top of the Release and replaced by a new date; the Release states that Plaintiff is Hispanic, however, Plaintiff is not Hispanic. ¶ 12.

On September 24, 2015, CIR Defendants took the deposition of Plaintiff, Erica Almeciga. However, CIR Defendants did not produce the original "Release" during Ms.

Almeciga deposition either. During Plaintiff's deposition, Mr. Burke, introduced as Exhibit 1, a document he marked and identified as "Standard Appearance Release." ¶ 13.

Again, this was a photocopy of the "Release". ¶ 13.

After Mr. Burke introduced this photocopy of the "Release", he asked Plaintiff to review the document. See ¶ 14.

Counsel for Plaintiff, Kevin Landau, asked Mr. Burke if he had an original of the photocopy of the "Release":

"Do you have an original of this?" ¶ 15.

In response to Mr. Landau's question, Mr. Burke stated as follows:

"**I don't know**." ¶ 16.

Mr. Landau responded to Mr. Burke as follows:

"So, for the record, I just want to make reference for the record that Defendants' Exhibit 1 is a copy, no original is present, and it has some type of, I don't know, distorted blotches behind the content, which I'm assuming would not appear on the original piece of paper –" ¶ 17.

At her deposition, Ms. Almeciga testified that she did not sign the "Release" produced by CIR Defendants and that it was not her signature on the Release. ¶ 18.

On September 30, 2015, CIR Defendants took the deposition of Wendy Carlson, Plaintiff's expert witness. At Ms. Carlson's deposition, CIR Defendants again failed to produce the original of the "Release". ¶ 19.

III. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where "there is no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail, the movant must "'demonstrate the absence of a genuine issue of material fact. . . . The burden is then on the non-moving party to set forth specific facts raising a genuine issue of fact for trial."' *United States ex rel. Romano v. N Y. Presbyterian*, 426 F. Supp. 2d 174, 177 (S.D.N.Y. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 324 (1986)).

IV. ARGUMENTS

A. Under the Best Evidence Rule, If CIR Defendants Are Unable or Unwilling To Produce The Original Of The Purported Photocopied Release, Then There Is No Genuine Issue To Be Tried In This Matter, And Plaintiff Is Entitled To Judgment As A Matter Of Law.

THE BEST EVIDENCE RULE

It is a well established rule that where the existence or contents of a document, which include any signatures it contains, are in dispute, the "best evidence rule" requires production of the original document, to protect against perjury, fraud, inaccuracies, or mistakes in copying. *Bell Atlantic Yellow Pages v. Havana Rio Enterprises Inc.*, 184 Misc.2d 863, 866 710 N.Y.S.2d 751 (2000) (internal citations omitted).

The best evidence rule requires generally that '[t]o prove the content of a writing, ... the original ... is required.' *Carroll v. LeBoeuf, Lamb, Greene & MacRae, L.L.P.*, 614 F.Supp.2d 481, 484 (S.D.N.Y. 2009) (internal citations omitted). While a duplicate of an original is generally admissible "to the same extent as an original," Rule 1003 authorizes a court to exclude a duplicate where "a genuine question is raised as to the authenticity of the original*[.]" Carroll, supra.* Rule 1003 therefore permits the use of copies rather than originals, but with an important proviso—**the original, rather than a copy, still must be produced if there is "a genuine question ... as to the authenticity of the original."** *Carroll, supra.* (emphasis added)

"There is a sound reason for this proviso." *Id.*

As Judge Weinstein has pointed out:

'The original [of a document] may contain, and the copy may lack, such features as handwriting impressions, type of paper, and the like as may afford the opponent valuable means of objecting to admissibility. For example, the original may be a pasted-together version that gives an entirely different impression than a smooth photocopy.'[1] *Carroll, supra* at 485..

"Thus, Rule 1003 excludes a copy where there is a genuine dispute as to the authenticity of an original as an added protection against the receipt of evidence as to the content of the originals **where the original itself might provide evidence of forgery or fraud that cannot be discerned from a copy."** *Carroll, supra* at 485. (emphasis added)

In the instant case, the Best Evidence Rule requires CIR Defendants to produce the original of the purported Release they have offered in defense of this matter. The existence and contents of the purported Release, including any signatures it contains are in dispute, and therefore the Best Evidence Rule requires production of the original document to protect against perjury, fraud, inaccuracies, or mistakes in copying. Further, there is a genuine question as to the existence and authenticity of the original, and therefore, the original must be produced. As such, if CIR Defendants cannot produce the original, then there is no genuine defense (issue) to be asserted in this matter, and Plaintiff is entitled to judgment as a matter of law.

B. Application Of *Carroll v. Leboeuf, Lamb, Greene & Macrae, L.L.P.*, 614 F.Supp.2d 481, 484 (S.D.N.Y. 2009) To The Instant Case.

In *Carroll*, one of the defendants', Chenery, who was allegedly a promoter of a tax shelter scheme in which the plaintiffs had 'invested', moved for summary judgment dismissing the complaint. *Id* at 482. In opposition to the Chenery defendants' motion, the plaintiffs' relied on the contention, among others, that the Chenery defendants sent two letters to the plaintiffs in which it represented that it had retained two prominent New York law firms to advise on federal tax issues but failed to disclose the identities of the

[1] 6 Joseph M. Mclaughlin, Weinstein's Federal Evidence § 103.03[4] (2008).

law firms or the fact that they had acted as promoters of the tax shelter, thus precluding the plaintiffs from relying on their opinions to avoid penalties. The plaintiffs did not produce the originals of the alleged letters despite the Chenery defendants' request, explaining that they did not have them. *Id.* The Chenery defendants moved to exclude the copies of the two purported letters proffered by the plaintiffs on the ground that the copies were unreliable, that the plaintiffs failed to adduce sufficient evidence to permit a finding that they were authentic, and that the best evidence rule foreclosed receipt of the copies in evidence in view of the existence of genuine questions as to the authenticity of the originals. *Id.*

In the instant case, like the plaintiffs in *Carroll*, CIR Defendants here rely on the contention that Plaintiff signed the photocopied "Release" they have offered in defense of this matter, which Plaintiff has vigorously contested. However, CIR Defendants have not produced the original "Release" despite being the central issue in dispute, and despite Plaintiff's requests, and despite discovery ending and the deposition of Plaintiff and that of her handwriting expert. Plaintiff is the only party in this matter to offer an expert opinion, as detailed in the expert's Rule 26 Report, which indicated that the purported Release did not contain Plaintiff's signature and handwriting. In addition, Plaintiff submitted other affidavits and documents to CIR Defendants, and the Court, contesting that Plaintiff signed the photocopied "Release" produced by CIR Defendants; and that indicate that the signature on the purported "Release" is not Plaintiff's. In addition to the foregoing, the purported "Release" offered by CIR Defendants is riddled with inconsistencies. For instance, the fonts on the Release are different throughout, contain multiple colors, the spelling of Plaintiff's name is different "Erica" vs. "Eryca" and the name is in different handwriting as well; the date is crossed out at the top of the Release and replaced by a new date; the Release states that Plaintiff is Hispanic, however, Plaintiff is not Hispanic.

Conversely, CIR Defendants did not produce an expert of their own to rebut Plaintiff's expert, and instead relied on the Affidavit of their counsel, and 2 documents attached thereto: 1) the photocopied-Release; and 2) Unsubstantiated Court papers from Georgia.

Quite simply, if CIR is not able to produce the original "Release", then summary judgment must be granted in Plaintiff's favor.

However, the proverbial "smoking gun" come in the form of defense counsel's own admission , during the deposition of Plaintiff, when Mr. Burke stated that he did not know if CIR had the original "Release". See ¶¶ 15-16.

Consistent with Defense counsel's own admission, the Court in *Carroll* stated as follows:

"While the Court assumes that plaintiffs' counsel has personal knowledge that…the documents in fact are true and correct copies of letters actually prepared by Chenery Associates, Inc. and actually sent to Kenneth Carroll. Indeed, it does not even claim that counsel or his client ever has seen the originals. The most that properly may be said is that counsel's affidavit would permit the inference that his client gave him the papers attached to his affidavit and, perhaps, that *483 his client told him that these papers were received by him from Chenery Associates. But plaintiffs have provided no affidavit or declaration of Mr. Carroll as to whether the papers in fact were received by him from Chenery Associates, or for that matter, anyone else." *Id* at 483.

Here, as in *Carroll*, the Court and Plaintiff, assumes that CIR Defendant counsel has personal knowledge that the exhibits to his affidavit— the purported copies—were produced by CIR Defendants and marked as exhibits at Plaintiff's deposition, however, Counsel for CIR Defendants affidavit does not show that he is competent to testify that the documents in fact are true and correct copies of the Release allegedly signed by Plaintiff; admittedly, counsel for CIR Defendants does not even know if CIR has the original "Release" offered in defense of this matter. See ¶ 16. The most that properly may be said is that the Affidavit produced by counsel for CIR Defendants would permit the inference that his client gave him the photocopied "Release" attached to his Affidavit and, perhaps, that his client told him that this photocopy was received by him from Plaintiff. See *Carroll, supra* at 482-483.

In *Carroll*, the name Mr. Hahn, appeared in cursive script at the foot of the purported copy of each letter, and he was questioned about each at his deposition. *Id* at 483. When Mr. Hahn was shown the copy of the purported letter marked as Exhibit 23, he stated that he had never before seen it and had not signed it. *Id.*

Here, the name 'Eryca Almeciga-Reta' appeared in cursive script at the foot of the photocopied "Release" produced by CIR Defendants, and she was questioned about said "Release" at her deposition where she testified under oath that she had never seen the purported "Release" (until it was shown to her by counsel) and that she did not sign the "Release" produced by CIR Defendants. See ¶ 18.

C. The Photocopies Of The Purported "Release" Must Be Excluded Under The Best Evidence Rule Because They Cannot Be Authenticated.

Based upon the doubts borne of Plaintiff's testimony, as to the authenticity of the Release, which the documents produced by CIR Defendants purport to be copies; it is sufficient to exclude those copies under the best evidence rule.

For instance, in *Carroll,* based upon the doubts borne of Mr. Hahn's testimony as to the authenticity of the originals of which the Exhibits purported to be copies of, it was sufficient to exclude those copies under the best evidence rule. *Carroll, supra* at 485. [2]

CIR Defendants were in sole possession and control of the original "Release" allegedly since August 2012, therefore, CIR is the only party that can produce the original of the its claimed "Release". Failure of CIR to produce such document is tantamount to its own acknowledgement that the original itself provides evidence of forgery and fraud that cannot be discerned from a copy.

Thus, CIR Defendants must produce the original "Release"; otherwise, their entire defense should be excluded from trial under the Best Evidence Rule.

D. **New York Case Law Supports Exclusion Of The Purported Release.**

In *Bell Atlantic Yellow Pages v. Havana Rio Enterprises Inc*., 184 Misc.2d 863, 866; 710 N.Y.S.2d 751 (2000), the plaintiff made no attempt to explain it's practice of destroying original contracts within a week after they were executed, before they were paid or performed; and a telephone company employee's testimony was insufficient to provide a foundation for admitting a facsimile of a copy of a microfilm of an alleged original contract

"The need to prove contracts like the one in question in order to collect payments claimed under them surely is foreseeable. The contract is critical to proof of the claim. For that very reason, the court must adhere all the more strictly to the requirement of an evidentiary foundation, establishing and explaining the destruction of the original evidence, before admitting a copy." *Id* at 866.

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[2] In *Carroll*, Mr. Hahn's testimony that he did not write the letters, that the signatures on them were not his, and that other circumstances relating to the content of the copies suggested that either the originals or the copies were forgeries raised genuine questions as to the authenticity of both. *Id* at 484-485. Based upon the doubts borne of Mr. Hahn's testimony as to the authenticity of the originals of which the Exhibits purported to be copies of, it was sufficient to exclude those copies under the best evidence rule. *Carroll, supra* at 485.

"The court may only deduce, from the other evidence of this particular collection, that plaintiff made the microfilm to preserve the document's contents and to facilitate further reproduction through computerized imaging processes. This inference may explain why the microfilm was made, but not why the original was destroyed, as this type of contract is not voluminous or remarkably burdensome to store.*" Id.*

Litigation in this matter commenced close to 5 months ago. Through his own admission, it is apparent that lead counsel for the defense, Mr. Thomas Burke, has never seen the original "Release". Nevertheless, Mr. Burke fervently cast his stones, propelled from the slingshots of baseless accusations; and two motions consisting of a frivolous Rule 12(c) and unwarranted Rule 11. Therefore, Mr. Burke's Declaration is about as useful as a hat on a donkey.

In *Lipschitz v. Stein*, 10 A.D.3d 634, 637-638 (2004), the admission of a physician's counsel during a charge conference, that patient log recording times that patients arrived at physician's office had been altered by physician's receptionist, required instruction that fraudulent purposes could be inferred from the destruction of evidence in medical malpractice action based on the physician's alleged delay in treating patient's eye infection following cataract surgery.

"Prior to summations, the plaintiffs' counsel stated that during the charge conference (which was apparently not recorded), "defense counsel conceded that he had the record, that the record was not produced intentionally because [the defendant's receptionist] had altered that document. Specifically she recorded the times that she claims or that the defense claims Mr. Lipschitz arrived in his office. Now that is a stipulated fact he has admitted.'" *Id* at 638.

Likewise, in the instant case, counsel for CIR Defendants admission at Plaintiff's deposition that he did not know if CIR had the original of the purported photocopied

Release offered in defense of this matter is a stipulated fact that a fraudulent purpose can be inferred from the destruction or absence of the original. See ¶¶ 8, 15-16.

In *Lipschitz*, the plaintiffs' counsel requested an instruction pursuant to PJI 3d 1:77.1 [2004], that a fraudulent purpose can be inferred from the destruction of evidence. *Id* at 638.

The defendant's counsel in response did not deny that the record had been altered and acknowledged that the defendant took 'responsibility for the fact that the record was not admitted in evidence.' *Lipschitz, supra* at 638. On appeal, the defendant argued that there was no evidence in the record that the patient log was destroyed or altered. *Id.*

However, counsel for the plaintiff claimed that the alteration of the document was a 'stipulated fact' that the defense counsel admitted at the charge conference and which was never denied by said counsel although he was afforded an opportunity to do so. *Id*.

"It may be inferred from the defendant's counsel's silence that the document in fact was altered, giving rise to a permissive inference of a fraudulent intent warranting a jury instruction to that effect." *Lipschitz, supra* at 638 (internal citations omitted).

In the instant case, substantially similar to the defendant's counsel in *Lipschitz,* counsel for CIR Defendants admission at Plaintiff's deposition that he did not know if CIR had the original "Release" offered as its only defense in this matter, is a stipulated fact that a fraudulent purpose can be inferred from the destruction *or* absence of the original. See ¶¶ 8, 15-18. [3]

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[3] See also *Proner v. Julien & Schlesinger, P.C.*, 214 A.D.2d 460 (1st Dept. 1995), where the Best Evidence Rule precluded admission of a copy of a fee referral agreement or file in the underlying action into evidence at trial of an action brought by a referring attorney to recover one half of attorney's fees received after settlement of underlying action, as attorney failed to meet strict requirement of proving evidentiary foundation establishing loss and lack of improper motive for nonproduction of originals.

V. CONCLUSION/RELIEF REQUESTED.

For the reasons set forth above, Plaintiff Erica Almeciga respectfully requests that this Court GRANT her motion for summary judgment

Dated: October 6, 2015
New York, New York

Respectfully submitted,

THE LANDAU GROUP, PC

By: ______________________________

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CERTIFICATE OF SERVICE

This is to certify that the foregoing papers have been electronically filed with the Clerk of the Court on October 6, 2015. Notice of this filing is sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF System.

Respectfully submitted,

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